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7 **BEFORE THE STATE OF WASHINGTON**
8 **ENERGY FACILITY SITE EVALUATION COUNCIL**

9 In the Matter of
10 Application No. 2003-01

11 SAGEBRUSH POWER PARTNERS, LLC,
12 KITTITAS VALLEY WIND POWER
13 PROJECT

INTERVENOR F. STEVEN
LATHROP'S MOTION TO STAY
ADJUDICATIVE HEARING

14 I. Requested Relief

15 Intervenor F. Steven Lathrop requests that the Energy Facility Site Evaluation Council
16 (EFSEC) enter an order that:

17 1.1 Declares that pursuant to GMA, EFSEC has no authority under Chapter
18 80.50 to preempt the Kittitas County comprehensive plan and development regulations; and/or

19 1.2 Stays the consideration by EFSEC of the Application or the applicant's
20 request for preemption unless and until the applicant complies with all Kittitas County
21 comprehensive plan and development regulations.

22 II. Evidence Relied on

23 Intervenor F. Steven Lathrop relies on the following evidence in support of this motion to
24 stay:

25 2.1 All pre-hearing orders and all testimony presented at prehearing conferences; and

26 2.2 The applicant's request for preemption; and

2.3 The prefiled testimony of Chris Taylor; and

INTERVENOR F. STEVEN
LATHROP'S MOTION TO STAY
ADJUDICATIVE HEARING

1 2.4 The prefiled testimony of Clay White; and
2 2.5 The prefiled testimony of David Taylor; and
3 2.6 The prefiled rebuttal testimony of Chris Taylor; and
4 2.7 The prefiled rebuttal testimony of David Taylor; and
5 2.8 The declaration of F. Steven Lathrop filed in support of Intervenor F. Steven
6 Lathrop's motion to stay the adjudicative hearing.

7 III. Discussion

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9 3.1 Introduction

10 Pursuant to Council Order No. 776 dated May 7, 2003, the Application was determined
11 to be inconsistent with Kittitas County (the County) land use ordinances, and Sagebrush Power
12 Partners, LLC (the applicant) was directed to make reasonable efforts to resolve the
13 noncompliance with the County. On February 9, 2004, the applicant filed a request with EFSEC
14 to preempt County land use ordinances under RCW 80.50.110 and Chapter 463-28 WAC, and
15 this requests is presently pending before EFSEC to be heard immediately prior to and part of the
16 Application hearing process commencing August 16, 2004. If granted, preemption would have
17 the effect of depriving Intervenor and Kittitas County of substantive rights under the Growth
18 Management Act as codified in Chapter 36.70A RCW ("GMA") and be in direct contravention
19 of GMA requirements.

20 RCW 80.50.110 does not exempt EFSEC from the requirements of GMA, and EFSEC is
21 required to comply with local comprehensive plans and development regulations. Kittitas
22 County has development regulations pertaining to wind power facilities. EFSEC lacks the
23 statutory authority to ignore the provisions of the Growth Management Act. EFSEC is,
24 therefore, without jurisdiction to preempt the Application from those regulations and should not
25 proceed with its hearings as otherwise allowed under Chapter 80.50 RCW unless and until the
26 applicant has complied with GMA.

27 3.2 Legal Authority

1 RCW 80.50.110 purports to grant EFSEC the authority to preempt local comprehensive
2 plans and development regulations if such local land use controls are in conflict with RCW
3 80.50. Specifically, RCW 80.50.110 states:

4 (1) If any provision of this chapter is in conflict with any other
5 provision, limitation, or restriction which is now in effect under any
6 other law of this state, or any rule or regulation promulgated
7 thereunder, this chapter shall govern and control and such other
8 law or rule or regulation promulgated thereunder shall be deemed
9 superseded for the purposes of this chapter.

10 (2) The state hereby preempts the regulation and certification of
11 the location, construction, and operational conditions of
12 certification of the energy facilities included under RCW
13 80.50.060 as now or hereafter amended. (emphasis added)

14 This statute was enacted in 1970 and later amended in 1975-76 2nd ex. s. c 108 § 37. There have
15 been no other amendments to this statute.

16 In 1990, the Washington State Legislature passed the Growth Management Act
17 (“GMA”), and Kittitas County opted into the GMA in December, 1990, through Resolution 90-
18 138. The legislative findings included in the GMA (RCW 36.70A.010) state:

19 “The legislature finds that uncoordinated and unplanned growth,
20 together with a lack of common goals expressing the public's
21 interest in the conservation and the wise use of our lands, pose a
22 threat to the environment, sustainable economic development, and
23 the health, safety, and high quality of life enjoyed by residents of
24 this state. It is in the public interest that citizens, communities,
25 local governments, and the private sector cooperate and coordinate
26 with one another in comprehensive land use planning. Further, the
legislature finds that it is in the public interest that economic
development programs be shared with communities experiencing
insufficient economic growth.”

27 The Legislature intended all development to occur through coordinated planning efforts. In
28 2002, the Legislature passed Engrossed Substitute Senate Bill 6594 amending RCW 36.70A.103
29 to require all state agencies to comply with local comprehensive plans and development
30 regulations. RCW 36.70A.103 states:

31 State agencies shall comply with the local comprehensive plans and
32 development regulations and amendments thereto adopted pursuant

1 to this chapter except as otherwise provided in RCW 71.09.250 (1)
2 through (3), 71.09.342, and 72.09.333.

3 The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not
4 affect the state's authority to site any other essential public facility
5 under RCW 36.70A.200 in conformance with local comprehensive
6 plans and development regulations adopted pursuant to chapter
7 36.70A RCW.

8 Through this same bill (ESSB 6594) the Legislature amended RCW 36.70A.200. The actual text
9 of section 2 of ESSB 6594 reads:

10 “ **Sec. 2.** RCW 36.70A.200 and 2001 2nd sp.s. c 12 s 205 are
11 each amended to read as follows:

12 (1) The comprehensive plan of each county and city that is
13 planning under RCW 36.70A.040 shall include a process for
14 identifying and siting essential public facilities. Essential public
15 facilities include those facilities that are typically difficult to site,
16 such as airports, state education facilities and state or regional
17 transportation facilities as defined in RCW 47.06.140, state and
18 local correctional facilities, solid waste handling facilities, and in-
19 patient facilities including substance abuse facilities, mental health
20 facilities, group homes, and secure community transition facilities
21 as defined in RCW 71.09.020.

22 (2) Each county and city planning under RCW 36.70A.040
23 shall, not later than ~~((the deadline specified in RCW 36.70A.130))~~
24 September 1, 2002, establish a process, or amend its existing
25 process, for identifying and siting essential public facilities~~((;))~~ and
26 adopt or amend its development regulations as necessary to
provide for the siting of secure community transition facilities
consistent with statutory requirements applicable to these facilities.

(3) Any city or county not planning under RCW 36.70A.040
shall, not later than ~~((the deadline specified in RCW 36.70A.130))~~
September 1, 2002, establish a process for siting secure community
transition facilities and adopt or amend its development regulations
as necessary to provide for the siting of such facilities consistent
with statutory requirements applicable to these facilities.

(4) The office of financial management shall maintain a list of
those essential state public facilities that are required or likely to be
built within the next six years. The office of financial management
may at any time add facilities to the list.

(5) No local comprehensive plan or development regulation
may preclude the siting of essential public facilities.

(6) No person may bring a cause of action for civil damages
based on the good faith actions of any county or city to provide for
the siting of secure community transition facilities in accordance
with this section and with the requirements of chapter 12, Laws of
2001 2nd sp. sess. For purposes of this subsection, "person"
includes, but is not limited to, any individual, agency as defined in

1 RCW 42.17.020, corporation, partnership, association, and limited
2 liability entity.

3 (7) Counties or cities siting facilities pursuant to subsection
4 (2) or (3) of this section shall comply with section 7 of this act.

5 (8) The failure of a county or city to act by the deadlines
6 established in subsections (2) and (3) of this section is not:

7 (a) A condition that would disqualify the county or city for
8 grants, loans, or pledges under RCW 43.155.070 or 70.146.070;

9 (b) A consideration for grants or loans provided under RCW
10 43.17.250(2); or

11 (c) A basis for any petition under RCW 36.70A.280 or for any
12 private cause of action. “

13 Subsection 1 of this section was not amended. Essential public facilities include facilities
14 that are typically difficult to site but does not include power generating facilities or make
15 reference to any overriding EFSEC jurisdiction under this section for this type use. Retained is a
16 bar to local governments from using comprehensive plans or development regulations to
17 preclude the siting of essential public facilities, which would include power generating facilities,
18 and, more importantly, authority over such facilities is not removed from the local jurisdictions.
19 EFSEC enjoys no exemption from GMA nor does it possess the present right to overrule, let
20 alone remove from or preempt a local jurisdiction, decisions concerning the siting of such
21 facilities.

22 The Legislature never intended to allow EFSEC, or any other state agency, to preempt
23 local comprehensive plans or development regulations prepared under the GMA, and EFSEC's
24 rules recognize that local regulations can be controlling. For example, WAC 463-47-120 states:

25 In determining whether a proposal is exempt from SEPA, the
26 council shall respect "critical area" designations made by local
governments under WAC 197-11-908.

If EFSEC is required to “respect” critical areas designations, one has to assume it is
prohibited from preempting any critical area regulations developed under the GMA. Further,
WAC 463-47-130 states:

In determining whether a proposal is exempt from SEPA, the
council shall inquire of the threshold levels adopted by
cities/counties under WAC 197-11-800(1).

1 Thus, EFSEC is required to consider the SEPA thresholds adopted by a local governmental
2 agency before determining whether a project is exempt from SEPA review. These examples
3 establish circumstances where EFSEC may not ignore local regulations.

4 The question before EFSEC is not a new one. In 1997, the question whether EFSEC can
5 preempt GMA enacted comprehensive plans and development regulations was before EFSEC as
6 part of the Olympic Pipeline application proceedings. EFSEC actually issued an order indicating
7 they would not rule on the issue. The following information was taken directly from Order No.
8 699, Application No. 96-1, Prehearing Order No. 1, related to the Olympic Pipeline application.

9 Counsel for the Environment (CFE) at the prehearing conference
10 repeated a concern raised during the land use hearing, asking that
11 the Council determine whether the provisions of the GMA “apply”.
12 The Council has earlier indicated in rejecting motions relating to
13 the land use hearing that the Council felt that it did not have
14 sufficient information or argument to make a determination on that
15 issue. The Council does not intend to enter an advisory opinion on
16 insufficient information or argument.

17 With the passage of the Growth Management Act, EFSEC’s ability to preempt local
18 comprehensive plans and development regulations became void. In other words, because the
19 GMA requires all state agencies to comply with local comprehensive plans and development
20 regulations and Kittitas County has development regulations pertaining to wind power facilities,
21 EFSEC is barred from preempting the County’s development regulations.

22 The Applicant, in an effort to insulate itself from this fatal flaw in the process, has
23 docketed comprehensive plan and zoning text amendments with Kittitas County. (See Exhibits A
24 and B of the Declaration of F. Steven Lathrop in support of Intervenor F. Steven Lathrop’s
25 Motion to Stay) If granted by the county commissioners these requests will have the effect of
26 modifying the Kittitas county comprehensive plan and zoning ordinances so that EFSEC’s
decision on this application, or any other application, is automatically deemed compliant with
local comprehensive plans and Kittitas County development regulations pertaining to wind
power facilities.

27 IV. Conclusion

28 Rather than commencing an Adjudicative hearing on the merits of the application.
29 EFSEC should stay the beginning of the Adjudicative hearing until the applicant has complied

1 with local comprehensive plans and Kittitas County development regulations pertaining to wind
2 power facilities.

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4 Respectfully Submitted this ____ day of July. 2004

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Jeff Slothower WSBA # 14526
Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.
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